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‘Working’ the International Child Protection Case: a snapshot of Local Authorities’ experiences within an evolving legal context

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Abstract:

Child protection proceedings often concern children with international connections. In recent years, the courts of England and Wales have handed down a number of significant judgments examining the application of international legal instruments (in particular Brussels IIa) to care proceedings. This article considers the impact of court judgments on practical ‘working’ by Local Authorities in international child protection cases. A case study was conducted, oriented by socio-legal theory, consisting of a small number of qualitative interviews with Local Authority lawyers and social workers. The article concludes that some judgments have acted as a catalyst to change working practices for Local Authorities. However, international child protection cases present a variety of challenges for Local Authorities, and judgments provide an imperfect site for the provision of procedural and substantive guidance in this complex area. Further, there is often a tension between the need to conscientiously adhere to such guidance, and the welfare needs of the children with whom the Local Authority was concerned.

Keywords: care proceedings; child protection; social work; Brussels IIa; family law.

Introduction

On 14 January 2014, the President of the Family Division, Sir James Munby, handed down judgment in a case concerning a 12-year-old Slovakian child who had been the subject of care proceedings in England; *Re E (A Child) (Care Proceedings: European Dimension)* ([2014] EWHC 6 (Fam); [2014] 1 WLR 2670). In his judgment, the President addressed a ‘wider context’ surrounding the facts of the case;

...one of frequently voiced complaints that the courts of England and Wales are exorbitant in the exercise of their care jurisdiction over children from other European countries. There are specific complaints that the courts of England and Wales do not pay adequate heed to BIIR (*Council Regulation (EC) No 2201/2003 of 27 November*

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2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000) hereafter ‘Brussels IIa’) and that public authorities do not pay adequate heed to the Vienna Convention (Vienna Convention on Consular Relations 1963). (*Re E*, [13]).

Munby P went on to provide extensive guidance about the application of international legal instruments to care proceedings with a European dimension, in a judgment which has influenced practice within Local Authorities in cases with an international element (hereafter ‘international child protection cases’).ⁱ

In the wake of Munby P’s judgment in *Re E*, there was a rapid development in international child protection jurisprudence in England and Wales. Many of the judgments that followed provided substantive guidance on the operation of private international law in care proceedings, as well as laying down standards as to how these cases should be ‘worked’ by Local Authorities - in cognisance of international legal instruments and mechanisms for cross-border cooperation and communication.

This study seeks to provide a snapshot of the influence of this body of international child protection case law on Local Authority working practices, through a small case-study. In-depth qualitative interviews were conducted with five Local Authority lawyers and three social workers examining their experiences and perceptions of international child protection cases. Their accounts were analysed using socio-legal theories of discretionary decision-making (Emerson and Paley 1992) and implementation (Halliday 2004). The study found social workers and lawyers were influenced in their working practices by international child protection judgments. They experienced a wide variety of challenges in these cases; challenges which could not be effectively resolved by reference to law (including case law) but which required prior practical experience, including experience of working with the countries involved. Often participants encountered a tension between the conscientious adherence to the law in this area, and the welfare of the children they were seeking to protect. These findings are outlined in detail below, but are first placed in context through an analysis of relevant international child protection judgments and the theoretical framework for this study.

Background

This study was prompted by a sudden cascade of reported judgments from the High Court, Court of Appeal and, latterly, the Supreme Court, from 2013 onwards, in care cases with a European element. As set out below, many of these judgments had the potential to significantly influence working practices within Local Authorities in international child protection cases.

The advent of these judgments can be traced to a belated focus on the application of international legal instruments, particularly Brussels IIaⁱⁱ to intra-EU care proceedings. Although Brussels IIa entered into force on 1 August 2004, and the majority of its provisions applied from 1 March 2005 (Brussels IIa, Article 72), it would appear that its impact on care proceedings in England and Wales was not felt for some time.ⁱⁱⁱ

Then, from 2013 onwards, in a series of cases involving children with connections to other EU Member States from Eastern Europe, overseas State authorities actively participated in care proceedings in England and Wales, complaining of insufficient compliance with international legal instruments, including Brussels IIa, by Courts and Local Authorities (see *Re T (A Child) (Care Proceedings: Request to Assume Jurisdiction)* [2013] EWCA Civ 895; *Re MP (Fact-finding Hearing: Care Proceedings: Art.15)* [2013] EWHC 2063 (Fam); *Re D (A Child)* [2013] EWHC 4078 (Fam)).

In a convergence of public and private international law, State authorities were joined as parties to proceedings and made written representations to the court - sometimes encompassing welfare submissions as to the best outcome for the child, as well as jurisdictional submissions on the application of Brussels IIa (e.g. *Medway Council v JB* [2015] EWHC 3064 (Fam); [2016] 2 FLR. 1360, [50]). Many of these cases engaged Article 15 Brussels IIa, which permits the transfer of jurisdiction to a court ‘better placed to hear the case’ where the child in question has a ‘particular connection’ with that Member State and transfer is considered to be in the child’s best interests (Brussels IIa, Article 15 (1); (3)).

The first tranche of these cases also brought into stark relief the differences between the child protection systems in the countries involved. Local Authorities and Guardians were criticised in some cases for arguing that plans for the child’s future care made by overseas State authorities were inadequate or risked exposing the child to harm (*Re D (A Child)*). In *Re T (A*

Child) (*Care Proceedings: Request to Assume Jurisdiction*) [38], Mostyn J termed a submission of this nature as a ‘chauvinistic argument which says that the authorities of the Republic of Slovakia have got it all wrong and that we know better how to deal with the best interests of this Slovakian citizen.’ The developing jurisprudence emphasised the importance of comity in international child protection cases, particularly when considering transferring jurisdiction in care proceedings to another Member State (e.g. *Nottingham City Council v LM and others* [2014] EWCA Civ 152).

The struggle to reconcile domestic child protection practices with the principle of comity was also apparent in some international responses to plans to place foreign national children for adoption in England and Wales. A ‘non-consensual adoption’^{iv} can take place when a court dispenses with the consent of a child’s parents to their adoption, if the child’s welfare requires this (Adoption and Children Act 2002, s 52). Whilst other jurisdictions may have a legal mechanism which allows for non-consensual adoption, the practice is more prevalent in England and Wales (see Fenton-Glynn 2016, Lamont and Fenton-Glynn 2016, cf. *Re D (A Child)* [35] (Mostyn J)). Those cases where a Local Authority proposed the adoption of a child with European connections were particularly controversial (e.g. *Merton London Borough Council v B (Central Authority of the Republic of Latvia intervening)* [2015] EWCA Civ 888; Bowcott 2015) and had prompted the presentation of a series of petitions to the European Parliament, criticising courts and Local Authorities in England and Wales. Following the presentation of these petitions, research conducted at the request of the EU PETI Committee into non-consensual adoption in England and Wales recommended that, *inter alia*, Local Authorities enhance their understanding of the application of Brussels IIa and engage with social work authorities in other jurisdictions in cross-border cases (Fenton-Glynn 2016. See also Borzova 2015).

Criticisms of the practice of international child protection in England and Wales by courts and Local Authorities were faced head on by the judiciary, though Munby P’s judgment in *Re E*.

Munby P set out two ‘practice points’ in his judgment. Firstly, pursuant to the Vienna Convention on Consular Relations 1968, where care proceedings concern a foreign national child who is ‘detained’ or is represented by a Guardian, the court should inform the relevant consulate of this fact. Secondly, in every care case with a European element, the court should

consider whether to request that the courts of another Member State assume jurisdiction pursuant to Article 15 Brussels IIa.

The latter was a particularly significant development. Prior to 2013, there was no reported case where Article 15 of Brussels IIa had been used to transfer care proceedings from England and Wales to another Member State, despite the Regulation having been in force for eight years. Following *Re E*, Article 15 was to be considered in *every case* involving another Member State. The judgment in *Re E* also cemented the judicial approach to international child protection cases at a normative level – European cases at least must be dealt with in an open, transparent way, in compliance with the relevant law and respectful of professional approaches abroad, with cross-border communication passing through official channels (see Brussels IIa, Article 55).

These practice points were expanded upon in subsequent High Court judgments. Local Authorities were advised to issue proceedings promptly in cases with an international element, and criticised for using Children Act 1989 s 20 to place children away from the care of their parents for extensive periods of time prior to issuing proceedings (*Leicester City Council v S* [2014] EWHC 1575 (Fam); *Norfolk County Council v VE and others* [2015] EWFC 30 (Fam); *Re CK (Children)* [2015] EWHC 2666 (Fam); *Merton London Borough Council v B (Central Authority of the Republic of Latvia intervening)*; *Re N (Children) (Adoption: Jurisdiction)*). In *Northamptonshire County Council v AS, KS, DS (By his Children's Guardian)* [2015] EWHC 199 (Fam), a Local Authority agreed to pay £17,000 in damages in an international child protection case where there were delays in issuing proceedings and filing an assessment of maternal grandparents in Latvia (amongst other issues). Local Authorities were also criticised for the manner in which they assessed potential carers overseas, by social workers travelling abroad and seeking relevant material from overseas authorities without due consideration of their national law or the potential relevance of the co-operation provisions in Brussels IIa, the EU Taking of Evidence Regulation^v or the EU Service Regulation^{vi} (e.g. *Leicester City Council v S*; *Norfolk County Council v VE and others*). Guidance was given on the allocation of cases engaging Article 15 Brussels IIa (*Re J (A Child) (Brussels II Revised: Article 15: Practice and Procedure)* [2014] EWFC 41; [2014] Fam. Law 129) and a number of judgments discussed its interpretation and the technical issues associated with transferring jurisdiction (e.g. *Bristol City Council v AA* [2014] EWHC 1022 (Fam); [2015] 1 F.L.R. 625; *Re HA (A Child) (No 2)* [2015] EWHC 1310 (Fam); *Re A and B (Children: Brussels II Revised: Article 15)* [2014] EWFC 40).

Eight years after its entry into force, a corpus of jurisprudence developed, applying Brussels IIa to intra-EU care proceedings. This jurisprudence was accompanied by an expansion of guidance for Local Authorities in other forms; from the Department for Education (see DfE, 2012, DfE, 2013, DfE, 2014), from the President of the Family Division (Munby, 2014; Munby, 2016) and through the relevant practice direction (see FPR 2010, PD 12A).

The aforementioned judgments, perhaps with the exception of *Re E*, were not necessarily intended to act as a source of substantive or procedural guidance for Local Authorities – i.e. they may not all be ‘guidance judgments’ as given, or approved by, the President of the Family Division (see *Re B (A Child)* [2017] EWCA Civ 1579) with the purpose of providing guidance as to the future conduct of similar cases. However certain judgments can influence working practices by professionals involved in the family justice system, irrespective of the status of those judgments.

An example of this can be found in the influence of the Supreme Court and Court of Appeal’s judgments in *Re B (A Child)* [2013] UKSC 33; [2013] 1 WLR 1911 and *Re B-S (Children)* [2013] EWCA Civ 1146; [2014] 1 WLR 563. These cases emphasised the exceptional nature of Placement Orders – that children should only be placed for adoption where ‘nothing else will do’ (*Re B (A Child)* [198]) and that in all care cases there should be a balancing of all the available realistic options for the child – a ‘global, holistic evaluation’ (*Re B-S (Children)* [44]) – before deciding the outcome which meets the child’s welfare. Although these judgments constituted a restatement, rather than a change, to the law (McFarlane, 2016), they were interpreted, not only within Local Authorities but also by courts and lawyers, as changing the law and imposing a more restrictive legal test for the placement of children for adoption. Masson *et al* (2017) found this jurisprudence had a substantive influence – resulting in significant reductions in the making of Placement Orders after the judgments were handed down, and increases in the numbers of Special Guardianship and Supervision Orders.

A similar influence might be found in the international child protection jurisprudence. For example, the case law which developed between 2013 – 2016 tended to indicate that the courts would readily consider Article 15 of Brussels IIa in intra-EU care proceedings, and would apply an ‘attenuated welfare test’ when considering whether the transfer of jurisdiction

was in the child's best interests (see *Nottingham City Council v LM and others* [35] Ryder LJ). The message of comity was emphasised to the extent that an assessment of what would happen to a child if jurisdiction were transferred to another Member State ran the risk of trespassing into a value judgment about child protection services abroad – an impermissible step (*J and E (Children: Brussels II Revised - Article 15)* [2014] EWFC 45, later overturned in *Re N (Children) (Adoption: Jurisdiction) (AIRE Centre and others intervening)* [2016] UKSC 15; [2017] A.C. 167).

However, in 2016 the Supreme Court in *Re N (Children) (Adoption: Jurisdiction) (AIRE Centre and others intervening)* rejected the concept of an attenuated welfare test for an Article 15 transfer. Lady Hale said at para [44];

...there is no reason at all to exclude the impact upon the child's welfare, in the short or the longer term, of the transfer itself. What will be its immediate consequences? What impact will it have on the choices available to the court deciding upon the eventual outcome?

A few months later, in *Child and Family Agency v JD* (Case C-428/15) EU:C:2016:819; [2017] I.L.Pr. 5 the CJEU considered the interpretation of Article 15 Brussels IIa. The court said (at [31]), that there needed to be some 'genuine and specific added value' for jurisdiction to be transferred to another Member State, but emphasised that such an analysis *must not* incorporate consideration of the substantive law of the requested Member State, as this would contravene the principles of mutual trust and recognition of judgments within the EU.

The judgments in *Re N* and *Child and Family Agency v JD* represent a change in the approach to transfers of jurisdiction under Article 15 Brussels IIa, albeit for different reasons. The CJEU has emphasised that an Article 15 transfer is an 'exception' to the criterion of proximity which 'must be interpreted strictly' (*Child and Family Agency v JD* [48]). The Supreme Court's decision permits a court to look at a wider range of factors than was previously the case when deciding whether it is in a child's best interests to request the transfer of jurisdiction to another Member State. These decisions are, however, difficult to reconcile with each other in terms of the approach to foreign substantive law within the best interests'

evaluation (see Lowe and Setright, 2017). For example, following the Supreme Court's decision in *Re N*, a Local Authority might object to a transfer of jurisdiction to another Member State on the basis of its potential impact on the long-term placement options available for the child. However, such an approach may be contrary to the CJEU's judgment in *Child and Family Agency v JD*.

This development in the case law represents another change in the substantive guidance available to Local Authorities. The influence of the earlier Article 15 case law on Local Authority practice is a point made succinctly by the Family Rights Group in their intervention in the case of *Re N* at para [2]. The change in approach to Article 15 transfers brought about by Munby P's judgment in *Re E* in 2014 led to a 'remarkable proliferation' of case law in the three-year period that followed, such that;

(h)itherto, courts would manage cases with a foreign element by evaluating foreign placement options and deciding upon the best outcome for the child themselves. Now, they may be more inclined to transfer the decision-making abroad.

The change in approach to Article 15 transfers indicated by *Re N* and *Child and Family Agency v JD* has further implications for how courts and Local Authority applicants might approach the question of transferring jurisdiction in care proceedings, but paints a confused picture as to the extent to which professionals can evaluate the reality that might face a child if proceedings are transferred. It is against this background that this study seeks to explore the influence of international child protection jurisprudence as experienced by professionals who actually encounter these cases in their everyday practice.

Theoretical Framework

To analyse participants' experiences of international child protection cases, this study drew upon two theoretical sources; Emerson and Paley's (1992) concept of 'decision horizons' and Halliday's (2004) analytic framework for the implementation of judgments within bureaucracies.

a. Discretionary decision making: the 'decision horizon' (Emerson and Paley 1992)

An important aspect of the day-to-day working of international child protection cases is the way that decisions are made by professionals who deal with the cases. Discretionary decision making within organisations has been the subject of extensive study in socio-legal scholarship. Discretion is often situated as a corollary of rules – in Dworkin’s famous analogy discretion is ‘like the hole in a doughnut, (it) does not exist except as an area left open by a surrounding belt of restriction’ (Dworkin 1967, p. 32). Rules authorise discretion, providing a ‘freedom to act’ (Lempert 1992, p. 185) as well as the boundaries for that action to take place (Feldman 1992). However, the boundaries for discretion may also be set by ‘social context limits’ (Feldman 1992, p. 182) or ‘social laws’ (Baumgartner 1992, p. 130) which in turn influence the substance of decisions.

When examining discretionary decision-making by Local Authority lawyers and, particularly, social workers in international child protection cases, an analytic framework focussing on a ‘rules-discretion dichotomy’ may not provide a complete picture (Emerson and Paley, 1992, p. 232). Child protection social work involves a process of evaluation of risk and welfare which is informed by the values and ethics of the profession. Seeing social work practice as action outside the constraint of rules – decisions made in the centre of Dworkin’s ‘doughnut’ – can elevate the power of rules at the expense of the expertise and values of the social work profession. It may be more apt to see social work practice as a discretionary or evaluative process informed and *influenced* (rather than constrained) by a range of factors, which vary in their impact on their professional practice.

Emerson and Paley (1992, p. 232) see context as an ‘interactionally and situationally emergent phenomenon’ where ‘particular traits are invoked or made relevant to specific decisions’. They use the phenomenological concept of a ‘horizon’ to describe the context that surrounds the discretionary decision-maker at a given time. A ‘decision horizon’ is the context ‘as known and understood by decision-makers as they confront and grapple with some decision-task’ (p. 234). Within the decision horizon, contextual factors are constantly shifting and varying in salience for the decision-maker. Thus, the horizon is something seen and perceived by the decision-maker, who draws upon different events, pieces of information or knowledge, values or experiences, protocols or sources of guidance or any number of surrounding ‘things’ in the making of a decision.

When decisions are made within an organisation the decision-maker may draw upon the knowledge and practices of the institution that they work in; thus, decisions are made within an ‘organizational horizon’ (p. 234). The organizational horizon ‘directs attention to decision-makers’ use of background knowledge of the institutional sources, meanings and parameters of the cases that now require decision’ (p. 234). Emerson and Paley, in their study of complaint filing within a District Attorney’s Office in Los Angeles, found that cases acquired ‘retrospective organizational horizons’ - the way that past cases were dealt with influenced the framing of future cases. The concept of the organizational horizon, and the retrospective organizational horizon, are applied in this study to examine the use – and the limitations – of judgments as a source of practice guidance for Local Authority lawyers and social workers in international child protection cases.

b. Implementation of judgments (Halliday 2004)

This study also draws upon Halliday’s (2004) analytic framework for the implementation of judgments within bureaucracies, which was used to examine the influence of judicial review on decisions made by housing officers (see Hunter *et al.* 2015). There are some difficulties with this as a theoretical basis for the current study. Judicial review is specifically designed to scrutinise government actions (Sunkin 2006, p. 122.) Courts in public law family cases do not expressly take this position or seek to pursue a regulatory goal. Further, the bureaucracies studied by Halliday make isolatable decisions, which *might* be the subject of challenge by judicial review, and thus there is only ever the potential for court scrutiny of their decisions. By contrast, once Local Authorities issue proceedings pursuant to Children Act 1989 s. 31, the court is always in a position to examine the decisions made by Local Authorities, and the potential for censure or criticism by the court is ever-present.

That said, Halliday’s analytic framework may help to examine how judicial approaches and judgment guidance can *influence* the conduct of international child protection cases. Halliday (2004) developed three concepts which determined the extent to which judgments permeated an organisation; ‘legal knowledge’, ‘legal competence’ and ‘legal conscientiousness’. Legal knowledge is a prerequisite for a judgment to have an impact on behaviour within an organisation. Legal competence is required to translate guidance given at a level of general principle to the multitude of factual scenarios that may face a bureaucrat in their daily lives - but where guidance within a case is sufficiently simple and clear, the need

for legal competence is lessened (Hunter *et al.* 2015, p. 88). Legal conscientiousness speaks to the extent to which individuals within an organisation feel the need to comply with or adhere to guidance in case law.

Halliday's analytic framework is also apt as it facilitates an examination of what he calls the 'decision-making environment' – 'a space where law and alternative normative influences co-exist' (Halliday 2004, p. 87). Local Authority lawyers and social workers are, through many international child protection judgments, required to take certain additional steps in international cases, as well as meeting their existing obligations, including, fundamentally, the duty to safeguard and promote the welfare of children looked after by them (Children Act 1989, s 22). Halliday's framework may assist with understanding how these cases influence Local Authorities' lawyers and social workers in the decision-making environment which includes a 'bundle' of other influences and requirements (Richardson 2004).

Methodology

This unit of analysis for this case study was the theoretical category of the international child protection case. Ragin (1992) speaks of the process of 'casing' whereby the researcher defines and categorises a phenomenon. The jurisprudence outlined above has reified the concept of the international child protection case, creating a category of cases capable of recognition by child protection professionals and practitioners. The theoretical category of the international child protection case for this study therefore draws upon the judiciary's treatment of these cases from 2013 onwards.

In-depth semi-structured qualitative telephone interviews were conducted with Local Authority lawyers (n=5) and social workers (n=3), which were transcribed and thematically analysed. The majority of participants (two lawyers and three social workers) worked at the same Local Authority, one which did not experience international child protection cases frequently. Perhaps as a result of this, those participants had (as outlined in the next section) found these cases challenging and problematic at times. Their accounts were illuminated by the experiences of three Local Authority lawyers who worked elsewhere, all of whom had greater experience of international cases.

Whilst it was helpful to study the working of international child protection cases with a particular focus on the experiences of one Local Authority, there are obvious disadvantages

to the sampling strategy employed in this study, which was constrained by time and also by the extent to which it was possible to secure participants. However, this is small a pilot study for a more extensive and systematic piece of research. It does not seek to arrive at conclusions capable of wider generalisation but instead seeks to provide a snapshot of the relevant issues. Participants have been anonymised and case details or countries involved have been either pseudonymised or removed to protect confidentiality.

Findings

a. The Value of 'Retrospective Organizational Horizons' in 'Working' International Child Protection Cases

Judgments, and the principles embodied within them, formed a part of the 'organizational horizon' surrounding the working of international child protection cases by lawyers and social workers (Emerson and Paley 1992). However, these cases presented significant practical and legal challenges which emerged during proceedings, and subsequently. Perhaps as a result, prior practical experience of international cases, by participants or by their colleagues, was highly valued. Emerson and Paley might call this the influence of 'retrospective organizational horizons' – 'a first tentative frame for attending to and beginning to process any particular case' which is constructed through prior practical experience of international child protection cases (Emerson and Paley 1992, p. 232).

On their own, judgments acted as a 'catalyst' to change the way decisions were made, in cases adding an additional layer of complexity to an already complex area, albeit that some judgments were more influential than others:

There are some cases where you read it and you go "yeah why am I bothering" because things seem obvious and a judgment is very fact specific. But then you get cases which are much more ground-breaking than that, which alter a kind of given notion and challenge the direction that practice is being taken. (L2)

However, this catalyst was perceived as acting upon an increasingly diverse demographic felt less acutely in Local Authorities with a mainly British population. Having spoken about the ‘migration explosion’ in her Local Authority, L1 said;

It was a learning curve. We have to confess that until the first judgment that came out...was it Thorpe that criticised Local Authorities for not grasping the issue? It was that judgment that made us think “oh actually we have quite a few, we ought to be doing this”. We asked colleagues in other Local Authorities who said, “oh no we don’t do anything”. But then we just had the explosion of cases so we had to get a grip of it and go with it. (L1)

And by contrast;

We are a very English Local Authority, very rural. The vast majority of the residents ...are white. We do have pockets of various different ethnic minorities but we are very un-diverse. We get a FMPO (Forced Marriage Protection Order) and think it’s really exciting but we have locums from (other Local Authorities) who do 10 a week. We are relatively sheltered as an authority but then it is quite hard to find the guidance that we need. (L3)

Dealing with international cases regularly had led to a greater level of confidence and efficiency in handling the challenges presented. This confidence was not shared by lawyers and social workers who did not encounter the cases frequently, an example of the value of retrospective organizational horizons for decision-making. L3 had more of a ‘smattering’ of international cases and felt that was ‘part of the problem’ as they had found them ‘relatively difficult’ to work in practice. SW1 described the experience as ‘daunting’ and SW3 said she hoped she ‘didn’t get another’ in her career.

The myriad of challenges that these cases can present lead interviewees to seek guidance from others perceived as having greater experience or knowledge. SW2 and SW3 found the ‘learning curve’ of their international case so steep that they recognised that colleagues would seek their advice in the future (‘if one comes to the team they will be looking at us’ (SW2)). The importance of a supportive team able to disseminate knowledge and experience was emphasised. L1 described being asked for by advice by social workers who

were unsure about international issues in cases where the legal department was not involved; ‘the stability of care and the close working relationship is absolutely fundamental. You can tell in Local Authorities that don’t have that.’

Social workers relied upon their legal department for information about law and judgments. SW1 received a great deal of support from the lawyer she worked with on an international case. By contrast SW3 had not been helped by the lawyer on a particularly complex international case;

We were misguided by our first solicitor on the case who did not understand international law and that caused a significant delay in our proceedings. Because we have got family in (another Member State) – but then how do we place them on orders? And the solicitor we had didn’t know. And we had really rubbish information from an international lawyer and it took months to get to the bottom of how we should do this appropriately. (SW3)

There was a perception that those Local Authorities who frequently dealt with international cases were ‘experts’ and other Local Authorities would look to them for advice. L1 described receiving phone calls from other Local Authorities, seeking advice, and a judge on another case directing that advice be sought from her, notwithstanding that the case was taking place in another part of the country. L5 also described this sharing of knowledge by ‘expert’ Local Authorities on international child protection cases; ‘we try to network as much as possible because at the end of the day we are all in the same boat. We are not competing. We are all trying to do the same thing’.

The creation of ‘expert’ Local Authorities who have learnt from experience is perceived as occurring in cases involving other issues, such as forced marriage, female genital mutilation, and, latterly, radicalisation;

When Tower Hamlets had one of the first cases they got ticked off by Mr. Justice Hayden because they hadn’t done something they should have done. So they said to us, “look, avoid this, do that.” So we learnt from their experience so we didn’t fall into the same trap. (L5)

Whilst this indicates the value of sharing knowledge between Local Authorities, it also serves to illustrate the fundamental problem of judgments as a catalyst for changes in practice – the catalyst is only formed when a case on a particular set of facts comes before (for the most part) a High Court judge, a judgment is written and guidance given. The catalyst only acts when a Local Authority has a case which engages the issues outlined in the judgment and recognises, or is informed of, its relevance.

Retrospective organizational horizons may be particularly influential in decision-making in international child protection cases, because the range of practical challenge these cases present is so diverse, and judgments can only go so far in providing a framework which explains how they should be dealt with – actual experience of doing a case provides a more useful and comprehensive framework for the Local Authority lawyer and social worker;

You are aware of the main sort of principles (in judgments). But each case is so case specific that yes you can know that the general guidance is that you need to contact the Central Authority and this that and the other but then the response you get depending on what country it is can be so very different that you do take it on board but it doesn't necessarily impact hugely on how the case progresses from then. (L2)

The diversity of approaches adopted by overseas authorities was a fundamental challenge for working these cases. For example, some States would permit UK social workers to visit and assess family members, whereas others suggested that social workers might be arrested if they tried to do so. Some States, by contrast, were incredibly helpful and conducted comprehensive assessments themselves or took steps to identify potential carers and facilitate placements. These forms of knowledge could only really be acquired through 'doing' a case, or through speaking to someone who had done one, rather than through judgments which were perceived as offering only generic guidance. More than one participant said that they would value a procedural guide which outlined the various requirements imposed by overseas States.

Many participants learned that dealing with an international child protection case requires a distinct form of practice compared with domestic cases under the Public Law Outline – the lawyer and social worker needed to be pro-active in 'chasing' information, particularly when foreign authorities are uncooperative or are slow in responding:

SW3: ...you can't go to court with a care plan saying "no they don't need anything". Because what Guardian and judge is going to approve a care plan like that? So we had to find support services out there.... I think we got to a stage where we just said "right we are going" And we drove around and....'

SW2: '...we just went and booked a few days to find out where the support services were. I think there was a centre maybe an hour and a half away. We went to the local children's team which is like two hours away. And we did it all so we weren't going to be criticised or say that we hadn't done anything or been thorough.... (SW2 and SW3)

As a LA lawyer when you are stood in court it is the judge looking at you and if you are the sort who is just turning up for the wage and going home you are not going to succeed at jurisdiction cases. You need to have lawyers who will actively pursue - and I mean pursue - foreign jurisdictions. Because often they don't respond and it takes threats of, you know, "come on I'm going to tell the judge" to get them to respond. (L1)

'Working' international child protection cases successfully also required creativity to circumvent challenges presented by un-cooperative overseas authorities, or where there is simply not the infrastructure or services to facilitate the assessments or provision of information sought:

In the early days we didn't get response so I would just pick up the phone and ring them. I remember the judge saying he didn't realise I spoke Lithuanian and I said I don't. Everyone thought it was hilarious they were shocked that I had thought to work out the time difference and pick up the phone using a number from an email.... And once I did it from court and it negated the need for us to come back to court. In my Portuguese case I managed to sort it because they rang the woman at the justice department in Portugal to say "come on" - in a nice way. (L1)

SW2 – (my manager) started going through trying to speak to anyone in (the Member State where a child might be placed) who she could. I got told by the judge I had to conduct the assessment.

Q – there was no question of the (requested Member State's) authorities conducting the assessments?

SW2 – No. (laughs) If I had tried that... they met with us once to talk about the case...

SW3 – ... and she said “I can’t be with you long my manager says I shouldn’t really meet with you”...

SW2 – that was after we were about to place the children there. We just wanted meet with them. It was the local children’s team. They wouldn’t even really meet with us or give us much time. (SW2 and SW3)

Participants were also conscious that the judges they dealt with in their local courts had variable experience of international child protection cases – perhaps indicating that the judiciary also benefits from the construction of retrospective organisational horizons to assist with their practice. Local Authority lawyers were conscious of the varying experience of the judges they faced and played a role in assisting the court;

You have obviously got a responsibility as a solicitor to make sure the judge knows what he needs to know as well. It’s not just a one-way street you can’t just turn up and say oh I’m too busy I can’t read any case law Otherwise the court might be misled if they have dragged in a Recorder who doesn’t do care. We have a judge who never loses her temper but she does care when she has to but she is a civil judge and you can tell that care is not her thing and she would really rather not. (L2)

I got a good dialogue going (with an embassy), we issued and then the judge made an order against the embassy and they disengaged. Towards the end of the case I did say to her that they disengaged after that order... I didn’t shy away from saying “the court did this and this was the knock-on effect.” (L1)

This raises questions about the conduct of these cases in areas where neither the Local Authority nor the judge have the practical experience to be able to construct a retrospective organizational horizon to assist with their decision-making.

Overall, participants were conscious of a change in approach to international child protection cases brought about by the case-law, albeit that some judgments were more

significant than others. However, this change in practice brought with it many challenges which are difficult to deal with in the absence of prior experience. The construction of retrospective organisational horizons can be an important part of decision-making in these cases.

b. Legal Conscientiousness Vs Welfare

All participants were legally conscientious, in the sense that they wanted to ‘comply’ with judgments in international child protection cases. In his study of compliance with administrative law in homelessness decision-making Halliday found that ‘sanction’ – in the form of potential judicial review – played a limited role in securing compliance (Halliday 2004, p. 170) The picture was more nuanced within Local Authorities dealing with international child protection cases. In addition to lawyers being conscious of their duty to the court, as illustrated above, sanction played on the minds of participants who feared censure by the court, or a care plan not being approved, if they were not sufficiently conscientious about the requirements set out in case-law.

Further, there was often a tension between legal conscientiousness through adherence to the ‘letter of the law’ and the need to safeguard and promote the welfare of children in these cases, for both lawyers and social workers. Dickens has illustrated that the lawyer / client divide can become blurred within Local Authorities, and that many lawyers do feel a sense of duty towards children and families in need of protection, and to assist the individual social workers, as well as seeking to uphold the Local Authority’s statutory duty towards children at risk of significant harm (Dickens 2004). The tension between legal conscientiousness and welfare may be all the more visceral for the Local Authority social worker.

A key site for conflict between legally conscientious behaviour and welfare was found in the context of delay. Communicating through ‘official’ channels was an often-cited source delay. Reported judgments and other forms of official guidance have emphasised that Central Authorities are the ‘primary point of contact’ for international assessment in Member and Contracting States, and that communication and the exchange of information is designated as taking place through Central Authorities pursuant to Brussels IIa and the 1996 Hague Convention (DfE 2014). However, most participants found that this way of communicating caused delay. L3 was concerned about delay on one case where the children were not in

culturally appropriate foster placements ('you feel almost more conscious on the delay and the potential impact that will have'). She went on to say;

I think that part of the other issue is that ICACU^{vii} are so busy as well that you contact them and they say we have three weeks to respond to you. Well it goes back to timing again. Every time we send them an email it takes a week to get a response. And so automatically I think we have built in about 6-7 weeks of delay just by waiting for emails. (L3)

...obviously we can't direct (ICACU) to do it by a certain time. It has been quite difficult and even when you chase them you don't get a response to say when you are likely to get a reply by. We can't feed back to the court and the parties about when we will get a response. (L4)

Participants with greater experience of international child protection cases, sought to minimise this delay by going through 'unofficial' channels. L2 spoke of social workers 'of their own initiative' making contact with social workers in Germany to conduct assessments of paternal family members to get things going quickly at the pre-proceedings stage. However, once in proceedings the judge hearing the case had required 'liaison with the (overseas) authorities...though the formal channels'. L1 had forged links with foreign authorities, and whilst remaining outwardly legally conscientious using ICACU and the Foreign Process Unit, sought to minimise delay through her links, noting that most of her international cases were completed within 26 weeks (see Children Act 1989 s 31 (2) (a) and s 31 (5));

With our Brussels II cases what you are officially supposed to do is go through the Central Authority to contact the other central authority in the other jurisdiction. Sometimes I just go direct and copy in ICACU. If it is say Lithuania I know who deals with it in Lithuania I will ping her an email and say "Hi it's me just to give you a heads up I've just done an emergency application" and then I'll do the formal process through ICACU because I am assuming that they have some sort of monitoring of the workflow. So, in a lot of cases I don't need to go through ICACU because I know who I am dealing with in the other jurisdiction (L1)

In dealing with overseas authorities there is a perception of difference in the legal culture surrounding child protection in England and Wales compared with other Member States (Nelken 2004). The need to resolve care proceedings expeditiously is part of domestic law, but also the idea that delay in determining questions about children's upbringing is contrary to their welfare is an integral part of legal culture surrounding child protection in England and Wales. By contrast there was a perception that other States were less concerned about decision-making within a child's timeframe.

26 weeks means nothing to them. Trying to finish things off quickly means nothing to them. They were saying they could do the assessment in 8 weeks and now they are potentially telling us that they need 16 weeks to do it and you are like "well it's not that straight forward over here to go ok, you have another 8 weeks" (L3)

So we might say well we need it by such and such a date and they will say, "well you'll get it when you get it." So we then have to deal with that and report it back to the court. They have to adjust a timetable. So it is all very well telling us to put more pressure on the overseas authority but that doesn't necessarily count for very much. (L5)

For social workers in particular there is evidence of legal conscientiousness and fear of sanction giving rise to a 'loss of control' (Dickens 2006, p. 27). Dickens highlights that the social workers must balance their professional obligations of 'care, control and change' in their everyday practice, but that when a case enters the court arena 'in order to gain control over the case, (social workers) have to endure a loss of control.' (Dickens 2006, p. 24, 27). The loss of control occasioned by the scrutiny given to their professional assessment starts even before a case reaches court, in discussion with (and challenge by) Local Authority lawyers, and continues within the court arena.

For example, SW1 described a case with a plan to place a child with a kinship carer in another Member State and concluding proceedings with a Special Guardianship Order (SGO). However, recent local guidance had suggested that children should be placed with potential carers for period of time prior to the making of a SGO. In an international case, the interaction between this domestic guidance and international law creates complex jurisdictional issues. The competent authorities of the requested State considered the interim placement required their consent pursuant to Article 56 Brussels IIa, and would not consent until they had

conducted what was essentially a duplication of the assessment already undertaken by SW1. The result was further delay to the children's transition to their permanent placement, and a longer period spent in foster care in England, where siblings were placed separately:

It makes it difficult for us to work with professionals and foster carers in terms of explaining it to them as well. It is a concept that I am just getting my head around so having to explain it to schools and to health professionals that actually this won't be the potential move date ... has been quite difficult and quite difficult for all of us to understand.... I mean six months for us isn't that long but for a child that feels like years. So they don't get the fact that I can't give them dates which is what the littlest are really struggling with at the minute. The fact that I can't say this is going to be your move date and this is the date when you are going to meet the new carers. They don't get the international element and why we are having to do more assessments.... It is obviously having a real emotional impact upon them.... (SW1)

SW2 had also felt her professional judgment was overridden by the law:

I think we have some amazing solicitors in our team but their reality of it to ours is different.... Yes, they are really clever, they are amazing and we are really grateful for them. But ultimately when you have got the court more and more dictating to you what you should do in your care plan but you know these children better than anyone else...we end up in a situation where, for example, we are forced to make a placement long term and we do it and we know it is not the best thing for the child but we are forced by the court and they say this is the best thing for the child and it breaks down. And we knew that was not the right decision for the child. (SW2)

The conduct of assessments overseas in a manner acceptable to the foreign State in question is another form of legally conscientious behaviour (see *Leicester City Council v S*). However, sometimes assessments were conducted by overseas authorities which were of poor quality or failed to provide sufficient information for an adequate care plan. Participants spoke of trying to make up for deficiencies in various ways, such as paying for a potential carer to stay in the UK for a period of time so that they could be further assessed, carrying out 'top up' assessments by Skype or by telephone, or by commissioning assessments through Children and

Families Across Borders (CFAB). However, sometimes children were placed overseas on the basis of assessments which did not meet the standard required in a domestic case:

We reached the point where we felt well there are some unanswered questions but this family member would be good enough. And subsequently whilst the authority said it would have preferred adoption, that was the plan that was approved by the court and these children have now gone to live with the relative ... We would want the highest standard possible but we may have to settle for something less.... (L5)

Overall, there is a sense that adhering to guidance given in international child protection judgments, and assimilating the themes of the judgments (that of mutual co-operation, trust and respect) into everyday practice, had the potential to create situations where participants felt the child's position was marginalised or compromised, representing an additional challenge for Local Authority lawyers and social workers in these cases.

Conclusion

The concept of the international child protection case developed a particular significance and distinct characteristics following the judgment of Munby P in *Re E*. That judgment was given at a time when courts and Local Authorities were subject to criticism from other EU Member States for their conduct in international cases, against a backdrop of increasing diversity in relation to the looked after child population. There is a sense that judges of the Family Division found themselves in the position of regulating Local Authority practices in order to prevent further controversies, as well as providing a substantive approach for international child protection law. This procedural and substantive guidance influenced Local Authorities, and this study has confirmed that certain judgments have acted as a catalyst to change working practices in these cases.

However, what may not have been anticipated by the judiciary is that the radical change in practice brought about by this body of jurisprudence would in itself create new challenges for lawyers and social workers, challenges which cannot be overcome by reference to existing external guidance. This study has identified that the lawyers and social workers interviewed made reference to 'retrospective organisational horizons' – prior experience by themselves or colleagues – to navigate the challenges these cases present. Thus, the Local Authority which rarely dealt with international cases found them particularly challenging. Furthermore, the

challenge of ‘complying’ with the guidance in judgments, whilst at the same time safeguarding and promoting the welfare of children, is an unanticipated complication in the everyday ‘working’ of these cases. A more effective route to securing a change in the *practice* of international child protection cases may come through the modification of professional training and education, rather than through an external legal force such as court judgments (see Hafford-Letchfeld and Bell 2015). These findings may indicate a need to provide comprehensive, multi-disciplinary training to Local Authority lawyers and social workers on international child protection cases, particularly for those who do not encounter the cases frequently, in a manner consistent with the values of their profession, the demands of their organisation and the vast the array of complexities such cases can present.

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ⁱ This study does not limit itself to consideration of intra-EU child protection cases, as it would seem the influence of the case-law discussed can be seen in cases involving countries outside the European Union. However, the rapid development of case law discussed in this article concerns care cases with a European element and there are fewer reported cases involving non-EU countries (see, for example, *Z (A Child: Egyptian Fostering UK Adoption)* [2016] EWHC 2963 (Fam) and *Re NH (1996 Child Protection Convention: Habitual Residence)* [2015] EWHC 2299 (Fam)). There are probably a number of reasons for this, which are outside the scope of this article, but may include the existence of a comprehensive instrument for the recognition and enforcement of judgments across the EU in the form of Brussels IIa, and the 'opaque' principle of mutual trust within the EU Area of Justice, a normative base which underlies intra-EU cases (Weller, 2015, 64). Further, it is right to acknowledge the limited use of the Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-Operation in Respect of Parental Responsibility and Measures for the Protection of Children (1996 Hague Child Protection Convention) due to Brussels IIa taking priority over the Convention in relation to children who have their habitual residence on the territory of a Member State (see Brussels IIa Articles 61 and 62). This may mean that there are fewer reported international child protection cases involving the UK and Contracting States to the 1996 Hague Child Protection Convention (but see *West Sussex County Council v H* [2013] EWHC 2550 (Fam))

ⁱⁱ *Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000* [2003] OJ L 338/1

ⁱⁱⁱ Article 15 of Brussels IIa had been used in cases involving the Republic of Ireland and England and Wales, and there are some reported judgments in this area (*Health Service Executive v S.C (Case C-92/12)* EU:C:2012:255; [2013] I.L.Pr. 6; *Re M (A Child) (Foreign Care Proceedings: Transfer)* [2013] EWHC 646 (Fam); *Re H-J (A Child)* [2013] EWHC 1867 (Fam)).

^{iv} This is the term used by Munby P in *Re N (Children) (Adoption: Jurisdiction)* [7] in preference to the term "forced adoption".

^v Council Regulation (EC) No 1206/2001 of 28 May 2001 on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters [2001] OJ L 174/1

^{vi} Council Regulation (EC) No 1393/2007 of the European Parliament and of the Council of 13 November 2007 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters (service of documents), and repealing Council Regulation (EC) No 1348/2000 [2007] OJ L 324/79

^{vii} The International Child Abduction and Contact Unit is the Central Authority for England and Wales for the purposes of Brussels IIa, and for England only for the purposes of the 1996 Hague Convention.